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IN THE

Supreme Court of the United States

October Term 1974

No. 74-787

DAVID PATRICK WILLIS, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT OF THE UNITED STATES.

MORRIS LAVINE,
215 West Seventh Street
Suite 620
Los Angeles, California 90014
Tel: MAdison (213) 7-3241
Attorney for Petitioner.

RICHARD G. REINJOHN,
Of Counsel

WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1725

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PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT OF THE UNITED STATES.

To the Honorable Chief Justice Warren Burger and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, David Patrick Willis, respectfully petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse judgments of conviction of eleven counts of alleged violation of Title 18 USC Sec. 922(a)(6) and Sec. 924(a), charging alleged violation of the Firearms Control Act.

JURISDICTION

Jurisdiction is conferred by Title 28, Sec. 1254, U.S. Codes, and by Rule 23, Rules of this Court.

The Court of Appeals rendered its decision on October 23, 1974, affirming the judgment of the Court below. A timely petition for rehearing was duly filed and denied on November 27, 1974. This petition is filed within 30 days allowed by law for the filing of a petition for writ of certiorari in this Court.

OPINION BELOW

A copy of the opinion of the Court of Appeals rendered October 23, 1974, is attached hereto marked Appendix "A" and made a part hereof.

A copy of the order of the Court of Appeals denying the petition for rehearing is attached hereto marked Appendix "B" and made a part herof.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are the Second, Fifth, Sixth, Ninth, and Tenth Amendments to the Constitution of the United States; Title 18 USC Sec. 922(a)(6) and Sec. 924(a); Rule 29, Federal Rules of Criminal Procedure, on motions for judgments of acquittal; Rule 52(b), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the statute and sections involved are so vague and indefinite on their face as to deny petitioner due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

2. Whether Title 28, USC Sec. 922(a)(6), must be strictly construed, requiring that any alleged false or fictitious oral or written statement violates the law only if such false or fictitious statement is made to a licensed dealer, but not to an unlicensed person.

3. Whether any such claimed false or fictitious oral or written statement violates subsection (6), only if specifically brought to the attention of a licensed dealer.

4. Whether petitioner had a right to rely on the statement of a New York Judge as a result of a plea bargain that he was being sentenced as if it was a misdemeanor and therefore he properly answered the questions asked of him on Form 4473.

5. Whether a corporation's unlicensed employees may fill out forms used as the basis for a government prosecution without the specific consent of the corporate officers and the approval of government agencies.

6. Whether the indictment in this case states an offense against the laws of the United States.

7. Whether there is a conflict between the decision of the Ninth Circuit in *United States v. Willis* and the

decision of the Seventh Circuit in *United States v. Jordan*, 454 F.2d 323.

8. Whether the failure to instruct the jury in the exact language of Section 922(a)(6) deprived the petitioner of a material element of his defense and of due process of law.

9. Whether the requirement of the procedure followed by the seller of the guns in this case violated the petitioner's Fifth Amendment rights against self-incrimination.

10. Whether the Firearms Control Act violates the Constitution of the United States on wholly intrastate activity.

11. Whether the Firearms Control Act, as construed and applied in this case, violates the Ninth and Tenth Amendments to the Constitution of the United States.

12. Whether the trial court erred in failing to grant motions for judgments of acquittal under Rule 29, Federal Rules of Criminal Procedure.

13. Whether the petitioner was denied fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

THE FACTS

Grant's for Guns, of Anaheim, was at all times discussed herein a duly licensed corporation existing under the laws of the State of California and was a duly licensed dealer in guns under both State and Federal laws. As such, it had a board of directors which operated and controlled the corporation under its Charter and By-Laws, which gave it whatever authority was required by law through its officers.

Under the laws of the State of California a corporation is a separate entity from its stockholders and employees and has a separate corporate existence. (*Erkenbrecher v. Grant,* 187 Cal. 7; *Hollywood Cleaning & P. Co. v. Hollywood Laundry Service,* 217 Cal. 124; *People v. Schmidt,* 147 Cal.App.2d 222, 229)

Two non-licensed employees, to-wit, Roy H. Davenport (R.T. 14) and Richard T. Takata (R.T. 34), worked in the gun department. The Grant's for Guns corporation never did adopt any resolution or delegate any of its functions officially to these employees who were the principal witnesses for the government. (R.T. 14-43)

The indictment in this case charged the defendant-petitioner with having acquired firearms from a licensed dealer in firearms on different dates specified in the indictment, having willfully and knowingly made a false and fictitious statement likely to deceive such (licensed) dealer with respect to a material fact as to the lawfulness of the sale of such firearms. The state-

ment allegedly was made and written by a non-licensed employee and put away in a folder without any evidence that the statement or statements were ever exhibited to any officer of the licensed corporation or approved or disapproved by such licensed dealer.

The indictment charged that the petitioner answered "No" to a question, 8b of Form 4473, which asked the question "Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year?"

A stipulation was entered into and received by the trial court that on February 21, 1967 the defendant, David Patrick Willis, was indicted in the City of New York by a State Grand Jury for the offense of criminally possessing a loaded firearm, as a felony, and that on February 26, 1968, in the Supreme Court of the State of New York, County of New York, defendant, David Patrick Willis, pled guilty to the offense of an attempt to commit the crime of criminally possessing a loaded firearm, as a felony. It was further stipulated that Grant's for Guns was at all times a licensed dealer from its opening and continuing to the date of the stipulation. (R.T. 42-43)

There was no stipulation that Davenport or Takata were authorized to act for the corporation, were delegated to ask questions and to fill out, in their own handwriting, or the handwriting of the petitioner, the answers which they solicited.

Roy H. Davenport testified that he had worked for Grant's for five years. (R.T. 14) He said that he knew

the petitioner sitting in the courtroom. (R.T. 15) The store was originally known as Grant's Boys and he managed the gun department as a salesman in the gun room. The store has soft goods, clothing, camp gear, etc., in addition to firearms and firearms components. (R.T. 16) The store had a standard practice for a firearms transaction. The court overruled an objection that a standard practice would be irrelevant (R.T. 17) and that under the indictment all that was concerned was what was done by Mr. Davenport in respect to Mr. Willis. (R.T. 17) The court overruled the objection, whereupon the witness outlined the general procedure. The witness then went on to describe the procedure as follows, which it appears was not contained in any statute, rule or regulation.

> "A. Writing up the gun, as we call it. We have two forms one is a State form which is in four-parts, one is the 4473 form, which is a Federal form. Then we fill out, basically, the State form first, and he signs that. We ask him three questions, or four questions, excuse me. Then we go to the Federal form, we fill it out in its heading only, in other words, who is buying the gun, what type of gun it is, the serial number of the gun. Then at the end of this five-day waiting period — all applicants have to wait five days before they pick up their gun, then in turn answer all the questions on the form and sign the form as we release the gun.
>
> "Q. Now, with respect to the fact that on hand gun purchases the buyer doesn't have to fill out

the questions until he picks it up, has that always been the policy?

"A. No, that has not. That just started, we were notified by ATF about a year to maybe a year and a half ago, could be less time, I'm not sure.

"Q. Prior to that, what was the practice?

"A. We would fill it out at the time he was there in the store initially, in other words, when he first purchased the gun, we would fill it out at that time and he would sign it at that time.

"Q. And what, if anything, do you do with the completed Federal form, I believe the number is 4473?

"A. Right, we then have to bind them in hard binders, and it's kept in our records indefinitely. They are all given a number, and we have to keep them according to date and number." (R.T. 18-19)

The witness Davenport was asked (R.T. 21-26):

"Q. Now, do you recall these specific transactions?

"A. Not exactly. They all blend together. I can't honestly say that I recall a particular one, other than I know Pat Willis and I know he has been in there, of course, but I can't isolate one particular sale.

"Q. But you can recall the dealings with Pat Willis?

"A. Yes, I can.

"Q. Generally, at the Anaheim store how did these transactions occur?

"A. Well, generally, when I was there, especially, Pat would always come in and talk to me, then I would — we would go on over what he wanted to buy, and I would usually make the sale, and not always, I think I would get called to the phone, or always, I couldn't write it up myself, so I had one of the guys that works for me write it up for me, to finish the transaction for me.

* * *

"Q. Now, you mentioned there were some State questions involved, that were asked prior to tendering to the purchaser the Federal form?

"A. Right.

"Q. What were those State questions?

"A. First, at the very top one is: 'Are you a citizen of the United States?'

"The next one is: 'Have you ever been convicted of a felony?' "

* * *

"THE WITNESS: It was just one of these."

* * *

"THE WITNESS: Vaguely, your Honor, but I couldn't honestly say that I can pinpoint the particular time. If you would show me this without the date on it, I probably couldn't tell you that.

"THE COURT: On that occasion would you

have had a State form that you talked with the defendant about?

"THE WITNESS: Yes, sir, this is true.

"THE COURT: Do you recall asking him the question: 'Have you ever been convicted of a felony?'

"THE WITNESS: Not on this particular sale. I couldn't honestly say I have, but we do that on every sale that we sell a handgun, so it would be — yes, I would have done it, yes."

During a five-day waiting period, the store sends in the State form to Sacramento and also to the Anaheim (California) Police Department. (R.T. 32) The purchaser is not permitted to pick the gun up until after the expiration of five days.

Asked on re-direct examination if there was any indication by the purchaser to anyone filling out the form using the procedures outlined that the person did have a prior conviction of the kind talked about in the form, the witness replied that the transaction would not have been completed.

Richard Thomas Takata, the unlicensed assistant store manager, testified to the procedure followed in completing firearms transactions. (R.T. 35) The witness said he did not recall the exact transaction involved in the government's Exhibits 9 and 10 for identification without the date. (R.T. 35) The witness said that he would read the entire section to the person, ask them the questions verbally and then fill in the an-

swers for them and have them sign them. (R.T. 36-37) He said that when he first started working for Grant's that he filled the questions in with his own handwriting. Later he changed that method to the standard practice of asking them the questions and showing them the form and asking them to answer the questions with a yes or no answer, writing the answers down themselves. (R.T. 36) In none of the conversations he had with Mr. Willis did Mr. Willis ever indicate affirmatively the existence of a prior conviction or he would not have sold him the gun. (R.T. 39) Mr. Takata did not identify any specific transactions.

The petitioner called Donald A. Hopper, a New York attorney who represented petitioner in New York before Judge Sweitzer in February, 1968. He testified that he entered a plea bargain with the Court with an agreement that if he entered a plea of guilty pursuant to the plea bargain that the maximum period of incarceration that the defendant would be exposed to would be twelve months, and that he would be sentenced as if it were a misdemeanor. (R.T. 52-53)

The attorney told petitioner what Judge Sweitzer said he would do. The Judge simply said Mr. Willis would be sentenced as if it were a misdemeanor, which the attorney told Mr. Willis. (R.T. 53) The defendant was sentenced to nine months in jail with credit for time served.

The defendant made a motion for judgments of acquittal under Rule 29, Federal Rules of Criminal Procedure, which motion was denied. (R.T. 104)

In his motion for judgment of acquittal, counsel urged that the evidence of attorney Hopper was in no way impeached, (R.T. 105) and that upon the plea bargain having been carried out, the defendant could not have been sentenced to more than twelve months and therefore the correct answer to question 8b "Have you been convicted of a crime punishable by imprisonment by a term exceeding one year" was "No".

A second ground was that section 8b calls for a legal conclusion which only a Judge or an attorney was capable of making and that the language constitutes the vice of vagueness so that the effect would be that the response would be vague and uncertain. (R.T. 106)

The court, in instructing the jury regarding the provisions of Section 922(a)(6), simply instructed the jury that "You are instructed that the term 'dealer' means any person engaged in the business of selling firearms at wholesale or retail" without pointing out that the term "dealer" refers only to a licensed dealer and that salesmen Davenport and Takata were unlicensed persons.

REASONS FOR GRANTING THE WRIT

This case raises important questions of due process of law in the procedure which is required to be set out to carry out the purposes and objects of the Gun Control Act of 1968 "to provide for better control of the interstate traffic in firearms".

Title 18, Section 922(a)(6), provides as follows:

> "(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a *licensed* importer, *licensed* manufacturer, *licensed* dealer, or *licensed* collector, *knowingly* to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter." (Emphasis added)

Section 924(a) provides as follows:

> "(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of *a person licensed* under this chapter, . . ." (Emphasis added)

The statute does not set out any procedure for licensed dealers to follow and the statute as construed and applied in this case leaves it to the operations of unlicensed employees to implement the statute because this area is not covered by statute or Act of Congress, thus leaving the alleged commission of a crime to rest upon the acts of unlicensed persons.

In *U.S. v. Giordano,* 40 L.ed.2d 341, and in *U.S. v. Chavez,* 42 Law Week 4460, the United States Supreme

Court, in a different setting involving the power of the Attorney General or the Assistant Attorney General specially designated by him, required specific authority and evidence gathered outside of that authority was tainted and required suppression since Congress did not authorize the specific procedure which was taken in those cases. Likewise, Congress did not authorize the specific procedure used in the instant case supplied by employees and not by the licensed dealer. The indictment charges that on the date specified in each count and from the *licensed dealer*, the defendant willfully and knowingly made a false and fictitious statement likely to deceive such dealer. There was no evidence by the dealer as to any false and fictitious statement likely to deceive such (licensed) dealer. The prosecution tried the defendant for alleged dealings with an employee and an assistant store manager and not with the licensed dealer. Such evidence is insufficient to support the judgments. (*Cole v. Arkansas,* 333 US 196, 202, 92 L.ed. 644; *U.S. v. Jordan,* 454 F. 2d 323)

In *M. Kraus & Bros. v. U.S.,* 327 US 614, 622, 90 L.ed. 894, 899, the Court said:

> "But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the

> Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act."

Neither Congress nor the Secretary has made clear the methods of implementing the statute so that the acquisition, possession or use of firearms is not burdened with undue or uncertain restrictions and individual employees who may be there today and gone tomorrow have the ability to create a crime by asking questions and carrying on a procedure not covered by law.

The Court erred in holding that Section 922(a)(6) is not void for vagueness in failing to define what constitutes a false or fictitious oral or written statement and in failing to define what constitutes "any material fact to the unlawfulness of the sale", etc. (*Connally v. General Construction Co.*, 269 US 395, 70 L.ed. 322; *Lanzetta v. New Jersey*, 306 US 451, 83 L.ed. 888)

The indictment in this case failed to state an offense against the laws of the United States. It could only state an offense if the alleged statement was made to a licensed dealer in firearms and not to some unlicensed employee and could only be material if the statement was submitted to such licensed dealer and the indictment alleged that he was deceived or likely to be deceived. It further failed to allege that any of

the firearms in question were actually obtained by petitioner as a result of such alleged false or fictitious statements and that such statements were willfully and knowingly made. The indictment reads as set out in Appendix "C" hereof.

There is nothing in the evidence which shows specifically that the petitioner willfully and knowingly made a false and fictitious statement to a licensed gun dealer or that any such licensed gun dealer was deceived in respect to a material fact as to the lawfulness of the sale of a specific firearm or that any statute or regulation set out in explicit and unambiguous terms the procedure that would be a violation of the law so as to bring criminal penalties of the Act into operation. The dividing line between evasion and lawful action cannot be left to conjecture. (*M. Kraus & Bros. v. U.S.*, 327 US 614, 621, 622, 90 L.ed. 894, 898, 899)

There is a conflict between the Ninth Circuit and the Seventh Circuit in the construction of Section 922 (a)(6) of Title 18, between this case and *U.S. v. Jordan,* 454 F.2d 323. In *U.S. v. Jordan,* the Court said: "Another reason why the conviction of defendant cannot be affirmed is that there was no evidence that Joseph Dooley, from whom the defendant had acquired the firearm, was a licensed dealer within the meaning of Section 922(a)(6) of Title 18. Therefore, a material or 'essential element' of the offense for which defendant was convicted was at no time introduced into evidence or in any manner proven by the Government. On this failure of proof alone the conviction fails."

The evidence was insufficient to justify the verdicts. There was no identification by the two witnesses of any gun or weapon which was obtained from the corporation with any deception or knowledge of the corporate officers. This is plain error on the face of the record which calls for action by this Court under Rule 52, Federal Rules of Criminal Procedure. Where a person is convicted in the face of a total lack of evidence, it is a violation of due process of law. (*Shuttlesworth v. Birmingham,* 382 US 87, 15 L.ed.2d 176)

Likewise, the indictment in this case, carefully examined, fails to charge an offense against the laws of the United States in that the indictment fails to charge that the alleged answers to question 8b deceived the licensed dealer in this case. There is no evidence that the corporation or its authorized officers were deceived or that the unlicensed employees asked them to ratify the transactions.

The answers to the questions asked on 8b of Form 4473 were correct as a matter of fact because the trial Judge entered into a plea bargain, which he carried out, to sentence the defendant for a term of less than a year, to-wit, nine months, and as for a misdemeanor. There was nothing in the statute that said that the defendant could not rely upon the action of the New York Judge and that the answer to the question was factually correct in the light of the fact that his sentence was nine months or less than a year. In California, where the defendant resides, the law makes a felony a misdemeanor if the sentence is reduced to a period

of less than a year. (Penal Code of California, Section 17; *Doble v. Superior Court,* 197 Cal. 556

This Court should grant certiorari where the law of the State of California would fairly construe the situation of the petitioner as a misdemeanor and that a truthful answer would be "No" to the interrogatory.

This Court should grant certiorari to determine where the citizen should look to determine what is forbidden and what is lawful and not to construe the acts in this case as in violation of Section 922(a)(6) and Section 924(a), where the statute and the regulations fail to separate the corporate entity from the individuals who were not licensed.

Unless the material fact as to the lawfulness of the sale of the firearm was submitted to the licensed dealer, to-wit, the corporation and the officers who were called upon to act upon the matter, no offense was committed. Merely to answer "No" to an unlicensed salesman or an unlicensed assistant manager would not violate the statute. If Grant's for Guns, a corporation, intended for these persons to act in such matters, it would seem, under the law, that the corporation would be required to have these persons obtain the license, if they could qualify for such a license, and until they did so they would be in no different position than an Assistant Attorney General who did not have the authority of the Attorney General to act in matters of search and seizure. (*U.S. v. Giordano,* 40 L.ed.2d 341)

Question 8b on Form 4473 is vague and indefinite and calls for a legal conclusion and is violative of fair notice and due process. (R.T. 98)

The result of the plea bargain entered into by the petitioner was a sentence of nine months and the trial Judge in New York carried out his agreement to sentence the petitioner as for a misdemeanor.

In his motion for judgments of acquittal under Rule 29, defense counsel urged the Court that the testimony of the petitioner's witness, Mr. Hopper, the New York lawyer who represented petitioner and had been a member of the District Attorney's office in New York City (R.T. 48, et seq.), was unimpeached that there had been a plea bargain pursuant to which petitioner could not, upon his plea of guilty, be sentenced to anything in addition to twelve months. (R.T. 104-105) Further, that petitioner had a right to rely on that so that his answer to question 8b would correctly be "No" and so Mr. Willis' judgment in answering the question was a correct one. Furthermore, the question and its response left no room for any explanation.

Under the proceeding followed by these store employees the requirement which sought information out of the lips of the petitioner would make the statute in violation of the Fifth Amendment and require the purchaser of a gun or guns to incriminate himself and furnish evidence in advance against himself. It is similar to the registration requirement struck down by the United States Supreme Court in *Haynes v. U.S.*, 390 US 85, 19 L.ed.2d 923. Furthermore, the statute as construed and applied placed in the hands of unlicensed employees the ability to create a crime and violated Section **923 of Title 18,** which reads as follows:

"(a) No person shall engage in a business as a firearms or ammunition importer, manufacturer, or dealer until he has filed an application with, and received license to do so from, the Secretary. The application shall be in such form and contain such information as the Secretary shall by regulation prescribe. Each applicant shall be required to pay a fee for obtaining such a license, a separate fee being required for each place in which the applicant is to do business, as follows: . . ."

In instructing the jury, the Court failed to tell the jury that Roy H. Davenport and Richard T. Takata were unlicensed persons and therefore any oral or written statements to them did not comply with the statute.

The Court committed plain error on the face of the record (Rule 52(b)) in instructing the jury that "You are instructed that the term 'dealer' means any person engaged in the business of selling firearms at wholesale or retail" (R.T. 162) without telling the jury that the person had to be licensed.

The Court also failed specifically to rule on objections to the government's closing argument. (R.T. 169-170) It was prejudicial error for the prosecutor to talk about 23 mistakes. (R.T. 147) This was not the charge against the defendant and was unfair comment oobjected to by the defense. (R.T. 148, et seq.) It denied petitioner fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

On March 11, 1974, petitioner was sentenced to the

custody of the Attorney General for five years, the maximum period prescribed by law and for study described in Title 18 USC Sec. 4208(c) as to Count One, with the same sentence imposed to run concurrently on Counts Two through Eleven. (C.T. 191-193; R.T. 91, 92)

It is important that this Court grant certiorari in this case to clarify the rights and duties of corporations dealing in guns and of the requirement of their employees to be licensed, if they are qualified, in compliance with Section 923. It is further urged that the petitioner had a right to rely on the plea bargain of a New York Judge stating that he would sentence the petitioner as for a misdemeanor and that petitioner was so sentenced and therefore answers to interrogatories propounded to him were correct.

It is further submitted that Congress did not intend that applicants for guns would be required to answer questions that might incriminate them in order to secure or permit the purchase of a gun.

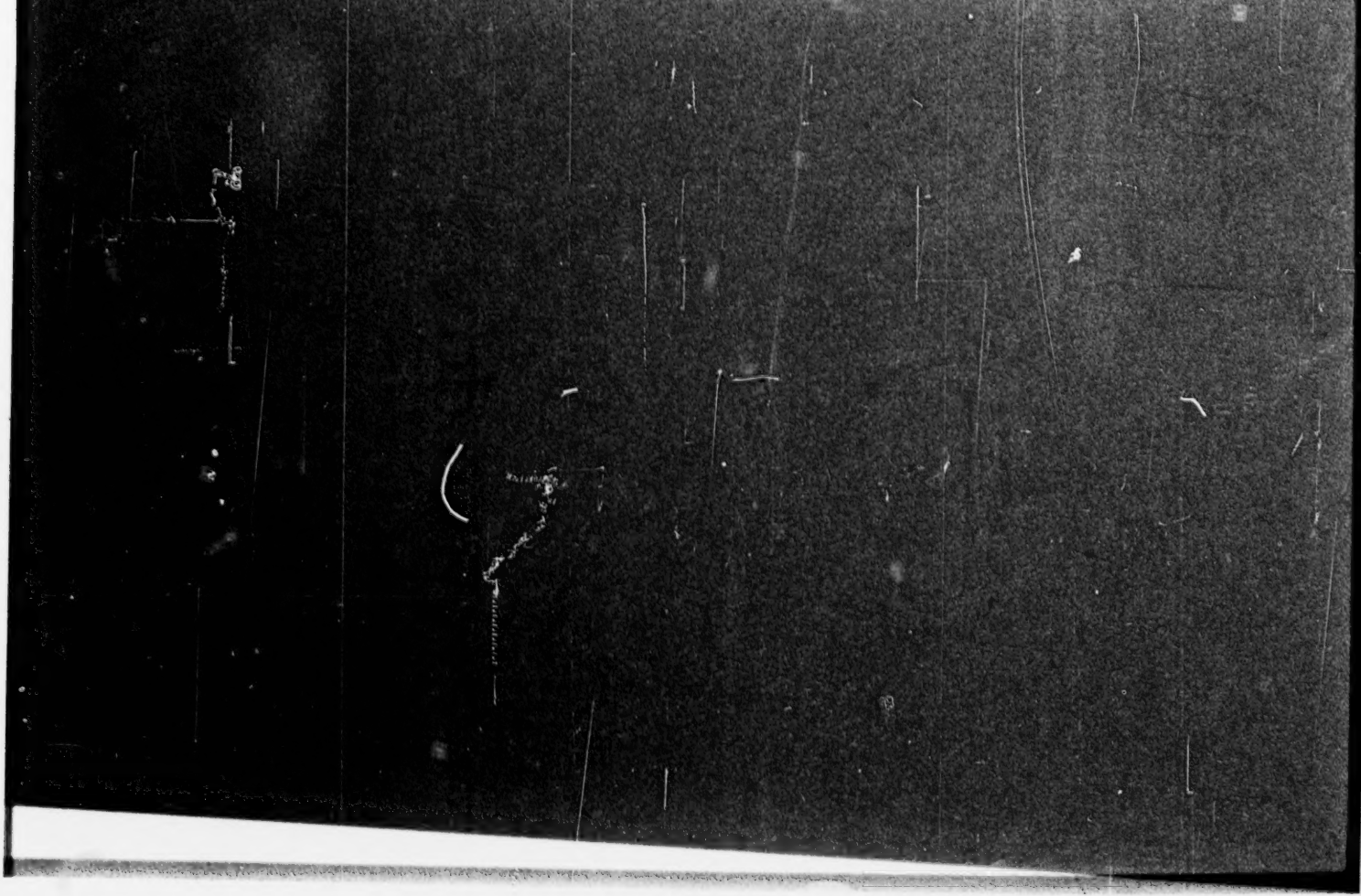
It is further contended that no statute set forth a proceeding that could be and was incriminatory as construed and applied in this case, thus violating the Fifth Amendment and the ruling of this Court in *Haynes v. U.S.*, 390 US 85, 19 L.ed.2d 923.

It is important that this Court grant certiorari to clarify and nullify uncertain and ambiguous procedure and reverse the judgments below.

Respectfully submitted,

MORRIS LAVINE.
Attorney for Petitioner.

RICHARD G. REINJOHN,
Of Counsel



APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No.
vs.	)	74-1751
DAVID PATRICK WILLIS, Defendant-Appellant.	)	

OPINION

[Filed October 23, 1974, U.S. Court of Appeals, Emil E. Melfi, Jr., Clerk.]

Appeal from the United States District Court

For the Central District of California

Before: DUNIWAY and CHOY, Circuit Judges, and SMITH*, District Judge.

PER CURIAM:

Willis appeals from his conviction in a jury trial on eleven counts of knowingly making false statements in acquiring firearms from a licensed dealer in violation of 18 U.S.C. § 922(a)(6) and § 924(a). We affirm.

*The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

In 1967, Willis was indicted in New York state court for criminally possessing a loaded firearm, a felony. Plea bargaining led to his pleading guilty to a lesser included offense of attempting to unlawfully possess a loaded firearm, still a felony with maximum sentence of 3½ years. During the bargaining the judge had said that if a plea were entered he would sentence Willis "as if it were a misdemeanor". The sentence imposed was nine months, which was duly served.

In 1969 Willis moved to California. Between 1971 and 1972 he bought eleven guns from a dealer in Orange County. Each time he filled in and signed the required state and federal forms. Question 8b on the federal form was:

> Have you ever been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: the actual sentence given by the judge does not matter — a yes answer is necessary if the judge *could have* [printed in bold face] given a sentence of more than one year).

He answered this question, "No".

Willis contends, among other things, that §922(a)(6) is void for vagueness and unconstitutional as applied to him, and that his answer to question 8b was not false. We disagree.

We are not persuaded by appellant's claim that that portion of the statute referring to a crime punishable by more than one year and the "Note" to ques-

tion 8b did not give fair and adequate notice to him under his particular circumstances. Willis would have us analyze his answer to question 8b from his perspective after the plea bargain was struck. From that point on, Willis argues, under New York Law, the judge could not have imposed a sentence of more than one year. In reading question 8b and applying the statute, we find no reason to adopt that distorted perspective. It is true that the judge did agree that he would not sentence Willis to more than one year, but that agreement does not alter the fact that the crime was "punishable by imprisonment for a term exceeding one year," as specified by the statute, 18 U.S.C. § 922(d)(1), and question 8b.

"The question itself was forthright and direct, stating that it was concerned with conviction of a crime punishable by imprisonment for a term exceeding one year and that this meant the term which could have been imposed and not the sentence actually given." *Huddleston v. United States,* ..... U.S....., ... (1974). We fully agree with this statement as applied to the facts presented to us by Willis. His answer to question 8b was false in each instance.

Appellant's other contentions are without merit.

Affirmed.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No.
vs.	)	74-1751
DAVID PATRICK WILLIS, Defendant-Appellant.	)	

ORDER

[Filed November 27, 1974, U.S. Court of Appeals, Emil E. Melfi, Jr., Clerk.]

Appeal from the United States District Court
For the Central District of California

Before: DUNIWAY and CHOY, Circuit Judges, and SMITH*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

*The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

APPENDIX "C"

UNITED STATES DISTRICT COURT

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

October 1973 Grand Jury

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 13426
v.	)	CD
DAVID PATRICK WILLIS,	)	
Defendant.	)	

INDICTMENT

[18 U.S.C. §922(a)(6); §924(a) : False Information on Firearm Transaction Form]

The Grand Jury charges:

COUNTS ONE THROUGH ELEVEN
[18 U.S.C. §922(a)(6); §924(a)]

In the Central District of California, defendant DAVID PATRICK WILLIS, in connection with the acquisition of a firearm from a licensed dealer in firearms, on the date specified in each Count and from the licensed dealer specified in each Count as listed below, willfully and knowingly made a false and fictitious statement, likely to deceive such dealer with re-

spect to a material fact as to the lawfulness of the sale of such firearms pursuant to Chapter 44, Title 18, United States Code, in that defendant DAVID PATRICK WILLIS answered "no" to question 8b of Form 4473, which asked the question, "Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year?", knowing that he had been convicted of a felony, punishable by imprisonment for a term exceeding one year.

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LWC: ms

COUNT	DATE	LICENSED DEALER
ONE	September 9, 1971	Grants for Guns, Anaheim, CA
TWO	September 9, 1971	Grants for Guns, Anaheim, CA
THREE	December 29, 1971	Grants for Guns, Anaheim, CA
FOUR	December 29, 1971	Grants for Guns, Anaheim, CA
FIVE	February 25, 1972	Grants for Guns, Anaheim, CA
SIX	April 14, 1972	Grants for Guns, Anaheim, CA
SEVEN	April 14, 1972	Grants for Guns, Anaheim, CA
EIGHT	April 21, 1972	Grants for Guns, Anaheim, CA
NINE	July 10, 1972	Grants for Guns, Anaheim, CA
TEN	July 10, 1972	Grants for Guns, Anaheim, CA
ELEVEN	November 17, 1972	Grants for Guns, Anaheim, CA

A TRUE BILL

.....

Foreman

.....

WILLIAM D. KELLER
United States Attorney

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-787

DAVID PATRICK WILLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Gun Control Act of 1968, 18 U.S.C. 922 (a)(16), is unconstitutionally vague, it improperly regulates intrastate transactions, and it abridges the Fifth Amendment privilege against self-incrimination. Petitioner also argues that employees of a licensed gun dealer are not licensed dealers under the Act.

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of eleven counts charging the making of false statements in connection with the acquisition of firearms, in violation of 18 U.S.C. 922(a)(6), and was sentenced to a term of five years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence showed that between September 11, 1971, and November 17, 1972, petitioner purchased eleven

weapons from "Grant's Boys", a sporting goods shop in Anaheim, California. For each purchase petitioner was required, pursuant to the Gun Control Act of 1968, 18 U.S.C. 922(a)(6), to answer questions contained in Treasury Form 4473. Question 8(b) of this form inquires whether the prospective purchaser has ever been convicted of a crime punishable by imprisonment in excess of one year.[1] Petitioner answered this question negatively on each of the eleven forms. In addition, when petitioner was asked by the seller, pursuant to California law, whether he had ever been convicted of a felony, he responded negatively (Tr. 14-26; 34-39).

It is undisputed, however, that petitioner was indicted in New York State in 1967 for ciminally possessing a loaded firearm, a felony. He subsequently pleaded guilty to a lesser included offense of attempting unlawfully to possess a loaded firearm (also a felony), the maximum penalty for which is a term of three and one-half years' imprisonment.

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[1]Question 8(b) in its entirety reads as follows:

> Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter—a yes answer is necessary if the judge could have given a sentence of more than one year).

Following all the questions on the form there appears the following cautionary notation:

> I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

In order to prove that he had not knowingly made a false answer on the Treasury Form 4473, petitioner introduced as a witness the attorney who had represented him in the New York proceedings. The attorney testified that while petitioner had originally been charged in New York with possessing a loaded firearm, he had agreed to plead to the felony of attempting to possess a loaded firearm in return for the judge's agreement not to impose a sentence of more than one year's imprisonment, although the maximum sentence permitted by law was three and one-half years (Tr. 52). On cross-examination, the attorney admitted that he had indicated to petitioner that he was pleading to a felony, although he would be sentenced to no more than one year's imprisonment as if the offense were a misdemeanor (Tr. 68-69).

The prosecution presented evidence in rebuttal that on July 1, 1971, petitioner had attempted to secure from California authorities a permit to carry a concealed weapon In order to obtain the permit petitioner had been required to fill out a local police form inquiring whether he had ever been convicted of a felony, to which he had made the false response of "no" (Tr. 79).

1. Petitioner raises a variety of constitutional challenges to 18 U.S.C. 922(a)(6). He contends, first, that Section 922(a)(6) and the question on Form 4473 are unconstitutionally vague for failing to define what constitutes a false or fictitious oral or written statement. This contention was, however, answered by this Court in *Huddleston* v. *United States,* 415 U.S. 814, 831, where the Court found "no grievous ambiguity or uncertainty in the language and structure of the Act. * * * The question itself was forthright and direct * * *."

Huddleston also disposes of petitioner's argument that Section 922(a)(6) improperly regulates intrastate trans-

actions. As this Court stated, "Congress intended, and properly so, that § 922(a)(6) * * * reach transactions that are wholly intrastate, * * * 'on the theory that such transactions affect interstate commerce' " (415 U.S. at 833; citation omitted).

Finally, contrary to petitioner's assertion, we fail to understand how the statute affronts the privilege against self-incrimination, since mere acknowledgment of a previous conviction of record can hardly subject one to further criminal penalties for that conviction.

2. Petitioner also argues that he could not as a matter of law be guilty under Section 922(a)(6) of making false statements to a licensed dealer because he only purchased the weapons involved from the *employees* of licensed dealers. It was stipulated at trial, however, that the corporation for which the employees worked was a federally licensed gun dealer at all times relevant to the case.[2] Since a corporate employee is simply the agent of the corporation, petitioner in effect made false statements to a licensed dealer.[3]

3. Finally, petitioner contends that he responded correctly to question 8(b), since the New York judge who sentenced him indicated pursuant to the plea bargain that he would impose a sentence of no greater than one year. As the cautionary note following question 8(b) specifies, however, "[t]he actual sentence given by the judge does not

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[2]In addition to this stipulation, the trial court instructed the jury that the dealer involved must be licensed (Tr. 161). Thus, no conflict exists between this case and *United States* v. *Jordan*, 454 F.2d 323 (C.A. 7), where no evidence was introduced to prove that the dealer indeed was duly licensed.

[3]Contrary to petitioner's contention that the indictment failed to state an offense, the indictment explicitly states that petitioner knowingly and willingly made false statements (Pet. App. C).

matter—a yes answer is necessary if the judge could have given a sentence of more than one year." The maximum sentence permitted under New York law was three and one-half years.

In any event, it was for the jury to determine whether petitioner had made the false statement willfully or as a result of a good faith misunderstanding. Indeed, there was ample evidence that petitioner's response was a calculated falsehood. Petitioner told the store salesmen and the local police department that he had never been convicted of a felony, when in fact his New York attorney had made clear to him in 1968 that he was being sentenced for a felony (Tr. 68).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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[4]Such "similar acts," were admissible at trial to show knowledge. See Rule 404 of the recently enacted Federal Rules of Evidence.